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The European Civil Code

The Way Forward

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Chapter

I - Civil society and political union pp. 1-27

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I Civil society and political union

> Napoléon Bonaparte in defeat and exile dreamt of a future 'association européen' with 'one code, one court, one currency'.[1]

Was Napoléon's speculation about the composition of the future European Union one of his dangerous fantasies? Or was he correct to believe that an association between the peoples of Europe would have to be founded on and sustained by unified laws, a single system of justice and a common currency? Are these apparently technical and humdrum matters concerning the law and commerce the crucial cement for binding together the nations and regions of Europe? Surely these devices could not be as important to the future of the European Union as the controversial topics debated in the press about constitutions, institutional reform, a rapid response force, a common foreign policy, the 'democratic deficit' and allegations of inefficiency and corruption? Notwithstanding the lack of media interest in the ordinary law of commerce and private relations, my thesis supports Napoléon's speculation: unified law, especially the laws governing commonplace social and economic interactions between people, could make a vital contribution to the future of the European Union. The general framework of this argument can be expressed in a few general propositions.

(1) The European Union today is a political structure without a community. It is a system of government for a continent, but this territory is fragmented into many political and cultural communities. Although nation states have pooled some of their

[1] Compte de la Cases, *Mémorial de Sainte-Hélène: Journal de la vie privée et des conversations de l'empereur Napoléon à Sainte-Hélène* (London: Colburn and Bossange, 1823), quoted in T. Judt, *Postwar: A History of Europe Since 1945* (London: Heinemann, 2005) 715.

sovereign powers in the institutions of the European Union, at the level of everyday social interactions, national borders still present serious obstacles to the formation of a single community – a transnational civil society. Because the European Union does not rest on a deeply integrated civil society, its political union often proves fragile and dysfunctional, to the detriment of all.

(2) Any successful community or social order is rooted in the bonds established through commonplace social interactions. In its basic elements, a cohesive civil society evolves through working together in productive activities, through exchanges of goods and services, and by the establishment of private associations, family relations, and all the different kinds of connections formed between ordinary people in their daily lives. In modern societies, private law – principally the laws of property, civil wrongs and contracts governing relations between citizens – helps to channel these relationships, to stabilise expectations and sometimes to correct disappointments and betrayals.

(3) Once established, these relations of civil society form the bedrock out of which political communities and shared identities arise. Through the long-term repetition of these social interactions of civil society, there emerges a belief on the part of the participants that they are members of the same community and share a common identity. Comprising a single people, an integrated community, they require and accept political union – a single governance structure – as well.

(4) The European Union, however, lacks such a dense set of connections between peoples. It has failed to establish an integrated transnational civil society out of which a common European identity could be constructed. The protection of fundamental economic freedoms by the European Treaties – the free movement of goods, services, capital and labour – created elements of a European civil society by giving citizens the right to engage in commerce across borders. The additional regulatory interventions of the Single Market initiative reduced further the barriers between national communities. These measures removed some of the most conspicuous obstacles to cross-border trade such as quotas, tariffs and prohibitions. But a more comprehensive and inclusive transnational civil society requires more extensive support.

(5) It is necessary to adopt common legal principles. By harmonising the basic rules and institutions governing social interaction in civil society, Europe can enable the evolution of a transnational civil society community. In short, as Napoléon foresaw, the European Union needs to work towards uniform laws: an integrated body of legal principles to govern all the different kinds of relations formed by citizens in a civil society.

These propositions comprise the central message of this book. At a time when many have lost faith in the possibilities for greater solidarity among the peoples of Europe, it is a message of hope. My project seeks to sustain the aspiration expressed in the European Treaties for a closer union of peoples in Europe in order to foster peace, prosperity and respect for human rights.

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
>
> The Union's aim is to promote peace, its values and the well-being of its peoples.[2]

We should not permit conflicts of interest and the posturing of nationalism to impede the search for permanent and more productive unity.

Yet closer political union cannot be imposed on a reluctant populace by the ruling political elites. In the name of democracy and accountability, grand constitutional schemes for a federal union will be interrogated and found sorely lacking. Instead, greater unity or social solidarity among the peoples of Europe must be sustained from below, in the networks and interdependencies of social life. Shared legal principles play an important role in supporting and channelling those many ties that bind individuals to each other and to their communities as a whole. Comprising an agreed statement of rights, obligations and principles, the principles of private or civil law articulate a community between individual citizens built on shared values of fairness and respect for others. By acknowledging common rules for a transnational civil society, the peoples of Europe can increase mutual trust and confidence, which is an essential strand in the construction of stronger bonds of solidarity. In the long run, rather than a political constitution, these common rules brought together in a Civil Code are the essential legal measure for the further evolution of Europe towards its aspiration of an ever-closer union of its peoples and more effective pursuit of its goals of peace, prosperity and respect for human rights.

[2] Arts. 1A and 2(1) inserted into the Treaty on European Union by Art. 1 of the Treaty amending the Treaty on European Union and the Treaty Establishing the European Community (the Lisbon Treaty) 13/12/2007, OJ C306, 17.12.2007.

1 The constitution of everyday life

Why is the project for constructing a Civil Code so important to the future of Europe? Are not solutions to other much-publicised problems – from the perceived illegitimacy of the 'democratic deficit' in Europe's institutions to the waste and inefficiencies generated by subsidies and quotas – more pressing and fundamental? Without denying the seriousness of the challenges presented by these and many other familiar sticks used to beat European institutions in the media, the case for regarding a Civil Code as a central project for Europe depends on its intimate connection to a broader aspiration. A Civil Code provides a vital ingredient in constructing an economic and social constitution for Europe. In the long run, in order to build greater solidarity among the peoples of Europe, it is this social and economic constitution that must be constructed.

This other constitution, what we shall call the 'Economic Constitution',[3] does not itself seek to alter the political arrangements for sharing sovereignty between nation states, let alone impose a federal sovereign state on Europe. Nor does this Economic Constitution impose changes in political allegiances. Rather, an economic and social constitution tries to establish a consensus of values regarding fairness and social justice for a community. It provides a cement of social and economic principles around which a community may build more permanent institutional structures. In Europe, this economic and social constitution is sometimes called the European Social Model. But this European Social Model remains unrealised: an aspiration that still requires both detailed articulation and popular acceptance.

A Civil Code would supply part of the detailed articulation of an economic and social constitution for Europe. These elementary rules provide the foundation for civil society by guiding, channelling and regulating social and economic interaction between individuals and business organisations. Private law rules require performance of contracts and respect for another's interests, both personal and proprietary. The precise meaning of the concept of private law differs between

[3] M. E. Streit and W. Mussler, 'The Economic Constitution of the European Community – "From Rome to Maastricht"' in F. Snyder (ed.), *Constitutional Dimensions of European Economic Integration* (London: Kluwer Law International, 1996) 109; W. Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27.

legal systems.[4] Some national legal systems, but not all, include family and domestic relations within this category, though the central focus of private law always concerns the economic and productive relations between ordinary people. Together, these legal rules construct a framework that ensures respect for personal dignity. At the same time these rules articulate principles and values regarding fairness and justice in social and economic relations with others. By combining these elements, a Civil Code describes a web of standards that comprise an economic and social constitution for society. This framework enables individuals to interact, to create reciprocal bonds, to form associations, to mix and to be inclusive. A Civil Code provides a constitution on which all the networks of civil society can be constructed, whether they concern economic exchange, social cooperation, or the establishment of permanent associations.

A Civil Code also initiates a process that leads to popular acceptance of this economic and social model. Every assertion of rights and obligations arising under the private law rules of the code implies an acceptance of its standards of justice and fairness. A complaint to a fishmonger by a customer that her mackerel tasted stale and bitter involves an acceptance of certain rules regarding sales of goods to consumers; any acknowledgement or response to the complaint also takes as a reference point those legal rules about contracts and their quality standards. Through such dialogues, multiplied by the near-infinite variety of interactions in civil society, the rules of private law are tested, refined and ultimately accepted as the legitimate ground rules. They become popularly accepted not by a momentary vote in a ballot but rather through the repeated use of the rules to guide behaviour and communications. The rules of civil law provide a shared basis for communications that enable trust and mutual understanding or, to paraphrase Damian Chalmers, an epistemic context for making plans and getting on.[5]

A Civil Code created at a European transnational level of governance achieves these goals across borders and cultures. It articulates the

[4] G. Alpa, 'European Community Resolutions and the Codification of "Private Law"' (2000) 8 *European Review of Private Law* 321; for a more sceptical account that doubts any stable meaning at all: D. Kennedy, 'Thoughts on Coherence, Social Values and National tradition in Private Law', in M. W. Hesselink (ed.), *The Politics of a European Code* (The Hague: Kluwer Law International, 2006) 9.

[5] D. Chalmers, 'The Reconstitution of European Public Spheres' (2003) 9 *European Law Journal* 127.

shared principles of fair dealing, just treatment and respect for the interests of others that constitute vital ingredients in a European Social Model. By relying on such a code of principles for guidance, citizens of Europe can more easily establish trust and respect despite the differences of languages, cultures and nationalities. The same standards would apply to a customer's complaint about rotten fish whether made in London, Athens, or Helsinki. A European Civil Code would provide the necessary epistemic context for communications that help to establish a transnational civil society across borders and between cultures.

Such a constitution for everyday life is normally presupposed by the constitution for the political institutions of the state. Historically, in nation states, civil law provided the bedrock on which political associations and institutions were constructed. The evolving rules of ownership, trade and personal status contained in private law described the structure and scope of a community. Legal discourses weave their own distinctive interpretations of the standards that should govern relations in civil society and how those standards are connected to broader political principles such as the protection of individual rights and the obligations of membership of a community. Reliance on the rules implies a common identity and membership in a community. Without such an implicit common identity and membership, it seems impossible to imagine a single polity, an association of all the peoples of Europe.

The European Union needs this other constitution – this constitution for everyday life – to further its economic objectives of promoting peace, the well-being of its peoples, and to secure its values of respect for human dignity, freedom, democracy, tolerance, justice and social inclusion. Without a foundation in shared principles of civil law that help to create a transnational civil society, endeavours to promote better cooperation and coordination at a supranational level of governance in Europe will surely remain frustrated.

The contemporary need for a European Civil Code arises precisely because the political elites have proceeded in their construction of a supra-national political constitution without having established in advance sufficiently dense networks of civil society on which such a constitution might rest. Like the constitution of a golf club, those political rules about membership and governance make little sense unless there is already an underlying network of individuals who play much the same game with each other according to their shared conventions. Similarly, for Europe, the interconnections of civil society need to be dense and intricate before greater political integration can be

contemplated. The central problem in Europe at present is not so much one of reconnecting citizens to its political institutions – a connection that was always thin in any case – but one of connecting citizens to one another across national borders in the ordinary relations of civil society.

Rather than having unity imposed from above, a Civil Code empowers citizens to construct their own interpretation of how the ever-closer union of peoples in Europe should evolve. By weaving the fabric of a civil society that extends beyond the borders of nation states through routine transactions of everyday life, such as buying goods, travelling, renting accommodation and studying in schools and universities, citizens will become more receptive to regarding themselves as having in part a shared polity or political society. They will become more willing to accept a political and social identity of being in part European, of sharing an identity in common with other Europeans, of being part of a wider political community or polity, while at the same time retaining their national and local cultures and allegiances.

The need for a European Civil Code derives from the need to facilitate the construction of a European civil society, in which national boundaries appear less significant as social and economic ties cross these artificial borders in associations and increasingly dense networks.[6] That European civil society relies on mutual trust and respect, which requires in turn a shared set of values and principles regarding fair dealing, fair opportunities and effective protections from adversity. A code of principles of private law articulates those values and ideals. It provides the foundations on which greater solidarity between the peoples of Europe can be built.

2 Mutual recognition

Yet is a European Civil Code really needed in order to achieve the aim of a transnational civil society? Surely it is possible to establish economic

[6] The term 'European civil society' is usually employed in a narrower sense in EU documents to refer to representative non-governmental organisations with European-wide membership, which can give voice to the concerns of citizens and business interests: EC Commission, *European Governance: A White Paper*, COM (2001) 428, 11–18. In this book my use of the concept employs the broader usage of social theory and refers very broadly to any cross-border social and economic activity within Europe. For clarifications, see: K. A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance' (2002) 8(1) *European Law Journal* 102.

and social ties across national boundaries without a uniform set of transnational rules? For centuries, indeed, nation states have found a route towards establishing thin threads of civil society across borders. They have achieved support for international commerce and other kinds of social relations without unifying civil laws. The method has depended in modern societies on a broad idea of mutual recognition of sovereignty.

Each nation state recognises the legal authority of the other states within those other states' borders. Further, each state recognises the legal authority of other states where the other's rules and jurisdiction seem to have the closest connection to the events under consideration. Under these rules of private international law (or conflict of laws), for instance, a traffic accident that occurs between a British driver and a French cyclist in France will be governed by French law, even if a claim for compensation is brought before an English court. Moreover, courts in the United Kingdom will respect the decisions of the French courts and even enforce judgments for damages awarded by the French court through domestic procedures. A special choice of law rule governs contracts involving international trade: as a general principle, though subject to exceptions, the parties to the contract are free to determine both the law that should govern the transaction and the courts which will have jurisdiction to adjudicate over any dispute. In order to promote mutual recognition and to avoid anomalies, the European Union has been working towards the harmonisation of these rules of private international law.[7]

This mutual recognition of the authority of other national legal systems goes a long way to make an international civil society possible. A contract that is binding under its governing law will normally be regarded as binding in whatever forum a dispute may be litigated. If a person is married according to the rules of one legal system, that person remains married while travelling the globe, even though the rules governing the formation and the very concept of marriage diverge considerably. Similarly, a contract may create a special type of proprietary interest under English law, and that interest is likely to be

[7] Reg. 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters; Reg. 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40; Reg. 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

respected even in a country that does not permit such a proprietary right under its legal system, provided that the contract is governed by English law.[8] The combination of choice of law clauses and mutual recognition by national courts enables international commerce to flourish.

Mutual recognition always has limits. National sovereignty is preserved over many issues, so that the effectiveness of foreign legal arrangements may not always be recognised on such grounds as public order and moral standards. If the special type of proprietary interest created by a contract runs contrary to fundamental standards of morality or public order, private international law does not require a national court to respect the applicable law. A contract of slavery, for instance, even though formed lawfully in the state of origin of the parties, would not be respected by the tribunals of any European country.

In pursuit of the goal of establishing a single market without trade barriers, the European Union has employed variations on this technique of mutual recognition to challenge national barriers to the free movement of goods and services. It has expanded the application of the principle of mutual recognition from legal rules to all kinds of regulations, administrative rules and market conventions. In relation to goods, for instance, the strategy has been to require Member States to respect the technical specifications for goods produced in other Member States under a 'country of origin' principle.[9] For example, a car produced according to the technical requirements in the country of assembly can be marketed throughout Europe without the need to comply with different product specifications in other Member States. Similarly, with regard to suppliers of professional services subject to

[8] The position is not absolutely clear in relation to certain kinds of security rights: J. W. Rutgers, *International Reservation of Title Clauses* (The Hague: TMC Asser Press, 1999).

[9] The 'country of origin' principle is not found in modern private international law rules, so there is a debate whether such EU measures conflict with or improve upon the underlying principles: H. Heiss and N. Downes, 'Non-Optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective' (2005) 13 *European Review of Private Law* 693; A. M. Lopez-Rodriguez, 'The Rome Convention of 1980 and its Revision at the Crossroads of the European Contract Law Project' (2004) 12 *European Review of Private Law* 167; R. Michaels, 'EU Law as Private International Law?' Discussion Paper 5/2006 (Bremen: ZERP, 2006). But from the perspective adopted here, these distinctions are not as important as the contrast between, on the one hand, harmonised laws and, on the other, mutual recognition and respect for the laws, regulations and standards of other nation states, which is the underlying principle of any private international law system.

regulatory regimes involving formal qualifications, the principle of mutual recognition seeks to enable professionals qualified in their home state to offer their services in a state where they do not satisfy the local regulatory conditions.[10] The country of origin principle applies also to the regulation of the provider of a service through electronic means: the regulations of the home country apply, even where the service is received in another country, though Member States are required to comply with common standards.[11] Again, this expansive use of the principle of mutual recognition as a technique for market integration encounters limits when Member States perceive that important issues of public order and safety are at stake.

Mutual recognition has been the traditional route for building international connections between civil societies. It provides the necessary assurance of legal support for international business transactions. Mutual recognition in all its guises appears to provide a tried and tested way of enabling international cooperation between civil societies, without the need for the adoption of uniform transnational laws. A first question that must be confronted here, therefore, is whether the project of developing a European Civil Code is necessary. Assuming that Europe does require projects that will lead towards the construction of transnational civil society, why will mutual recognition not provide an adequate and comprehensive alternative for building a transnational civil society in Europe? Why is greater harmonisation of the law necessary, when mutual recognition can enable transnational arrangements to be made and disputes to be settled?

3 Social dumping

Although mutual recognition facilitates transnational civil society, it also invites the risk of 'social dumping'. It threatens to undercut the standards that uphold public policy concerns. These concerns may include, for instance, labour standards, consumer safety rules, environmental protection measures and prohibitions against unfair competitive practices. With respect to technical standards there is a risk, for example, that products which conform to the health and safety

[10] E.g. Dir. 2005/36, OJ 2005, L255/22 on the recognition of professional qualifications.
[11] Dir. 2000/31, OJ L178, 17 July 2000, p. 1 on certain legal aspects of information society services, in particular electronic commerce; M. Hellner, 'The Country of Origin Principle in the E-Commerce Directive – A Conflict with Conflict of Law?' (2004) 12 *European Review of Private Law* 193.

standards of one country will be exported to another which requires compliance with more demanding regulatory standards. If mutual recognition permits such imports, the local regulations are effectively subverted. Consumers who purchase foreign products that merely conform to inferior technical standards may be disappointed by the shoddy or even unsafe imported goods they purchase. Similarly, if an employer in one country sends workers to another while retaining the permitted terms and conditions of employment of the country of origin, there is a risk that these workers posted abroad will receive rates of pay that fall below the host country's conventional standards and even below its mandatory rules concerning minimum wages. More generally, the power to choose the governing civil law of contracts encourages businesses to seek legal systems that favour their interests by, for instance, minimising the rights of consumers. In short, the principle of mutual recognition threatens to subvert all kinds of protective standards.

Given this pressure from business organisations to operate in the least restrictive regulatory environment, mutual recognition, especially in the strands of country of origin and free choice of law governing contracts, may provoke a regulatory 'race to the bottom'. It is predicted that nation states will reduce the regulatory burden under which businesses are required to operate in order to attract inward capital investment.[12] A manufacturer of electrical products, for instance, is likely to locate its plant in a country with low technical standards, to which it is inexpensive to conform, and low employment law standards that reduce the cost of labour to the business. In order to attract such a business to its territory, with the ensuing benefits of employment and wealth to be distributed around the community, any country will be tempted to compete for the investment by reducing their domestic regulatory burden. If every state joins this competition to attract capital investment by diminishing social and labour standards, a downward spiral of social protection seems inevitable. On this model, therefore, mutual recognition provokes the response of deregulation and the weakening of social protection.

Although this theoretical model of regulatory competition seems to exaggerate the actual risks in practice, the European Union has adopted measures designed to counter the most obvious dangers of social

[12] J. P. Trachtman, 'International Regulatory Competition, Externalization, and Jurisdiction' (1993) 34 *Harvard International Law Journal* 47.

dumping and deregulation. It permits national restrictions on imports where these controls can be justified by reference to a legitimate goal of public policy under a test of proportionality: the restriction on imports must be an appropriate and necessary control in order to give effect to the legitimate public policy concern.[13] With respect to the legal rights of consumers and employees, businesses are not permitted to exercise a choice of law in the contract which deprives consumers and employees of their rights according to their ordinary place of residence.[14] In addition, workers who are posted to a foreign country must receive basic terms and conditions that conform to those enjoyed by workers in the host country.[15] These protections against social dumping ensure that the greatest risks of abuse are avoided.

Nevertheless, social dumping is an inherent risk of any scheme of mutual recognition. The risk can only be completely avoided by rejecting the principle of mutual recognition in all its guises altogether.[16] In other words, uniform transnational laws solve the problem of social dumping, but only at the expense of abandoning mutual recognition and the diversity of laws. Although the European Union has so far confined uniform laws to regulatory initiatives that ostensibly pursue specific policy objectives, such as worker and consumer protection, the boundary between regulation and general contract law rules cannot be drawn sharply. Taking the problem of social dumping seriously requires the harmonisation of an ever-larger body of laws, edging ever closer towards comprehensive supranational laws, with the distant end point on the horizon of a European Civil Code. Mutual recognition does not, therefore, provide a sustainable long-term alternative to full harmonisation of laws.

4 Post-nationalism

An abandonment of the principle of mutual recognition in all its guises forces us to confront the deepest and most controversial issue provoked by calls for comprehensive principles of European law to regulate civil

[13] EC Treaty Arts. 28 and 30, discussed below in chapter II.
[14] Reg. 593/2008 'Rome I', above n 7.
[15] Dir. 96/71 concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1.
[16] For the contrary view that choice of law can be reformulated better to serve the public interest: H. Muir Watt, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy' (2003) 9 *Columbia Journal of European Law* 383.

society. Mutual recognition affirms the need to respect the diversity and integrity of nations. The idea that each national legal system should respect the rules of others where they are more closely connected to the issue or dispute exhibits the quality of the comity of nations. Each nation respects the sovereignty of others over their territories and their civil societies. Private international law functions in parallel to public international law: the latter requires mutual recognition of the sovereignty of states; the former requires mutual recognition of the integrity of the distinct civil societies protected by those states. A rejection of mutual recognition seems to entail both a move towards supranational organisations between states and a diminished respect for diversity in the cultures of civil society.

In Europe, it is still the case that national communities remain the principal focus for political life and group identity. The identity of individuals by reference to their holding a particular nationality is powerfully linked to the view that the nation state is unique in possessing political sovereignty. Although a nation state may agree in treaties to share its sovereignty with other states for a common purpose, that practice does not affect the view that the ultimate power and authority still resides with the nation state. For example, the North Atlantic Treaty Organisation (NATO) was created in 1945 as an international organisation, one to which its member states could join or leave according to their sovereign wishes. Although NATO performs the bulk of the vital function of defence for its members, this sharing of sovereignty did not create a supranational sovereign organisation. NATO is not an institution which is permanently vested with the authority to control and direct the defence policies of all its members. According to the policies of national governments, states may join, leave and even form rival associations for the purpose of defence, and NATO has no legitimate authority to prevent them from doing so.

The European Community commenced as a similar kind of non-sovereign international organisation. Its tasks were limited to the performance of particular functions. Following inaugural measures to integrate the production of steel,[17] the Common Market comprised an international treaty to create a single market without customs barriers and other impediments to competition between businesses.[18] Even as

[17] European Coal and Steel Community, Treaty of Paris 1951, which expired after fifty years on 23 July 2002.
[18] Treaty Establishing the European Economic Community, Treaty of Rome 1957.

the powers or competences of the European Community were subsequently expanded to encompass aspects of social policy, foreign relations and justice, the framework of an international organisation, without sovereign power, was preserved. The European Community performed functions on behalf of its Member States in a wide range of fields, but was not regarded as amounting to a supranational or federal body, which itself could exercise its sovereignty independently. In this sense, the European Community retained fidelity to the principle of mutual recognition: each state remained independent in principle, even though it had agreed in treaties to share its sovereignty over particular governmental functions.

As a consequence, the institutions of the European Community remained technocratic in outlook.[19] In particular, the European Commission (the executive body) was charged under the international treaties with the performance of certain functions as an agent of the collective will of the Member States. Its job was to fulfil its roles allocated by the international treaties, such as policing observance of rules against obstructions to cross-border trade, eliminating inference with competition and subsidising agricultural production. The actions of the Commission always had to be justified by reference to the logic of the allocated functional goals or competences such as market integration or a common agricultural policy. The mode of operation was limited to the types of regulatory powers established by the treaties. In practice, the Commission proposed regulatory measures that it believed would promote its functions. The Member States in the Council of Ministers could approve or reject the proposals. The original voting system conferred a veto power on Member States with respect to most areas of the competence of the European Community. Later on, commencing with the Single European Act of 1986, a majority voting system with detailed rules governing weighted votes according to the population size of a country was adopted for measures connected with market integration. Even so, in most fields of governance, Member States retain powers to veto European initiatives.

This technocratic structure of the European Union was hardly likely to appeal to the hearts and minds of the peoples of Europe. The institutions could be lambasted for their democratic deficit. The policies could be criticised for a narrow concentration on the integration of the

[19] W. Wallace, 'Rescue or Retreat? The Nation State in Western Europe, 1945–93', in P. Gowan, and P. Anderson (eds.), *The Question of Europe* (London: Verso, 1997) 21.

economic market, with too little attention being paid to social issues, such as protection of weaker groups. Progressive changes introduced by the Treaties attempted to respond to these criticisms of the European Community both by expanding the role of the European Parliament in the formulation of laws and by extending the range of functions of the Community.

As the governmental competences of the Community expanded, however, the line between a functional international organisation and a supranational sovereign entity began to be blurred. This sense that the European Community had embarked on a route towards becoming a supranational sovereign entity was only heightened by its renaming as the European Union,[20] the introduction of the notion of European citizenship alongside national citizenship[21] and the declaration at Nice in 2000 of Charter of Fundamental Rights of the European Union.[22]

The most dramatic stage in this blurring of the boundary between a functional pooling of national sovereignty and a supranational sovereign entity was the (proposed) Treaty establishing a Constitution for Europe.[23] Although this Constitutional Treaty was almost entirely a consolidating law that brought together in one text the various existing treaties and their amendments together with the Nice Charter of Fundamental Rights, at a symbolic level, particularly in the use of the word 'Constitution', it seemed to represent an acknowledgement of the arrival of a supranational entity. It spelt out the demise of mutual recognition. The word 'Constitution' implied that somehow the European Union could now act as a supranational governmental organisation without always being subject to national sovereign vetoes and controls. Article I–8 of the proposed Constitutional Treaty adopted all the conventional symbols of a sovereign entity: a flag, an anthem, a motto ('United in diversity'), a currency and a 'Europe day'.

When citizens were asked to vote in referenda on the proposed Constitutional Treaty, or national parliaments were asked to ratify it, they could vote against the treaty and its implied creation of a supranational governmental entity on the basis of any and all fears about what it might do, no matter how unlikely and contradictory those fears might be. It was as plausible for a Frenchman to vote against the proposed Constitutional Treaty on the ground that it might lead to a

[20] Treaty on European Union, 7/2/1992 [1992] OJ C191.
[21] Art. 17 EC, created by the Treaty on European Union 1992.
[22] 2000/C 364/01. [23] CIG 87/2/04 Rev. 2, Brussels, 29 October 2004.

dismantling of social protections in favour of a more *laissez-faire* market economy as it was for the British electorate to be minded to reject it on the ground that it might lead to the creation of an excessively rigid and paternalistic economic order. Although the proposed Constitutional Treaty made scarcely any changes to the existing treaties that might have affected Europe's philosophy about market regulation and social protection, that fact was beside the point.[24]

Whatever the political elites might maintain to the contrary, the real issue in the referenda and debates about the proposed Constitution was whether citizens were ready to accept a new stage in the development of post-nationalism in Europe. This step would involve the creation of a supranational governance institution with qualities that attributed inherent sovereignty to it. It was expected that national governments, though remaining highly significant, would share rather than merely delegate governance functions with the European Union. When they had the opportunity to speak or vote, the response to the proposed Constitutional Treaty from the peoples of Europe was often loudly negative. Many were reluctant to accept that the treaties had done more and should do more than establish institutional arrangements between nation states for the performance of limited and defined functions. Despite its declarations of citizenship and respect for fundamental rights, many people in Europe did not accept that the European Union had yet established a 'social contract' or community between all the citizens of those states.[25] Even those people who were broadly sympathetic to the project of the European Union did not regard themselves as associating already as citizens in a pan-European civil society. In the absence of that unity or solidarity in a transnational civil society, that popular sense of a post-nationalist political community, no foundation

[24] For a detailed analysis of the changes proposed in the Constitution: J.-C. Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge: Cambridge University Press, 2006).

[25] See for suggestions that such a 'social contract' or association of civil society must be presupposed by a European constitution: J. H. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and Ethos in the German Maastrict Decision', in P. Gowan, and P. Anderson (eds.), *The Question of Europe* (London: Verso, 1997) 265, 288: 'The Treaties on this reading would have to be seen not only as an agreement among states (a Union of States) but as a "social contract" among the nationals of those states – ratified in accordance with the constitutional requirements in all member states – that they will in the areas covered by the treaty regard themselves as associating as citizens in this civic society. We can go even further. In this polity, and to this demos, one cardinal value is precisely that there will not be a drive towards, or an acceptance of, an over-arching organic–cultural national identity displacing those of the member states.'

could be found on which to base even a tentative allocation of partial sovereignty to a supranational entity.

Following the demise of the proposed Constitutional Treaty after negative referenda in France and the Netherlands, the Lisbon intergovernmental conference of political leaders agreed in 2007 a watered-down version popularly known as the Lisbon Reform Treaty.[26] Although this revised Treaty repeats some plans for detailed changes to the functioning of the institutions of the European Union, its tone is very different. It stresses that the powers of the European Union are only those conferred by the Member States and that they retain sovereignty over everything else.[27] Although the Lisbon Treaty reaffirms that the Nice Charter of Fundamental Rights shall have the same legal value as the Treaties, it hastens to add that this recognition of the importance of human and social rights does not extend the competences of the European Union at all.[28] There is no more talk about the trappings of sovereignty such as flags, anthems and a special day.

The project to impose supranational governmental institutions from above seems moribund for the time being. The most that the political elites can achieve at present is some tinkering with institutions and marginal expansion of competences. Even these modest measures are

[26] Treaty amending the Treaty on European Union and the Treaty Establishing the European Community (the Lisbon Treaty) 13/12/2007, OJ C306, 17.12.2007.

[27] Art. 1.6, containing new Arts. 3a and 3b for the Treaty on European Union. Art. 3b states:

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

[28] Art. 1.8, containing a new Art. 6 for the Treaty on European Union with regard to fundamental rights. The governments of the United Kingdom and Poland insisted on a protocol that purports to clarify the limited legal implications of this measure by denying that it creates any directly effective rights. However, the European Court of Justice will interpret EU laws in accordance with the Nice Charter and its decisions will be binding on all Member States, so the new Art. 6 will have indirect effects on European law applicable in the United Kingdom See chapter IX below.

plagued by national opt-outs and unprincipled and opaque compromises. To the immense pleasure of its enemies and sceptics, the European Union has the usual trappings of a failed state: a technocratic apparatus that lacks both popular legitimacy and functional effectiveness in its pursuit of policy goals.

5 Networks of transnational civil society

How can the project of the European Union proceed any further? In my view, the key lies not in high politics but in civil society. To persuade citizens of different nationalities that the European project should be supported further in the direction of a supranational form of governance, a denser community formed of shared interests and cooperative associations needs to be established. Europeans need to feel that being European is an important part of their identity, that they are members of a society that partially transcends historic national borders.

One way to bring forward such a process of fostering a European identity is to facilitate and promote all kinds of private agreements that traverse national boundaries. Perhaps the humble package holiday has done more than anything else to facilitate such cross-border links. Although these holidaymakers may remain slightly cocooned in the plastic shell of a hotel by the beach, most venture outside and, despite language barriers, discover that the alien culture can quickly become familiar and welcoming. No doubt many other consumer transactions with a cross-border element help to establish denser links between separate communities. Shopping, eating in restaurants, riding on public transport in foreign cities begin to establish relations based upon stable expectations shared by consumers and business. Long-term family arrangements between partners of different nationalities also diminish the significance and consciousness of national barriers.

Of greater importance to this process of building a transnational civil society will be more permanent associations between groups who share common interests and concerns. Such associations might link together professionals such as doctors and lawyers in transnational organisations, which share knowledge but also establish normative standards for training, professional conduct and research.[29] Similarly, businesses in

[29] G. Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?', in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 3.

particular economic sectors can establish common technical standards regarding product quality, safety and environmental protection. These businesses may also establish common standards for their transactions among themselves along supply chains through standard form contracts. Such business associations might comprise an international clearing system among banks that establishes rules governing transfers of funds or rules governing the creation and transmission of other kinds of intangible financial products. For example, the International Chamber of Commerce provides standard rules for international payment transfers for the supply of goods under its Uniform Customs and Practice for Documentary Credits. Another example may be an integrated transnational supply chain that by means of computerised inventory control and ordering ensures the steady supply of fresh products to the consumer in a supermarket in another country. As well as business associations, transnational civil society can be constructed through networks and associations of professionals, groups with shared scientific concerns and links between institutions such as universities and research groups. Within such transnational associations, through dialogue, agreement, communication networks and observance of conventional practice, we can discern the evolution of shared rules of economic and social governance.

These business associations, social networks, technical standards bodies and scientific associations, together with long-term family relations and more transient transactions such as the package holiday, are the building blocks of a transnational civil society in Europe. They open up the possibilities for transnational networks between citizens to become denser and form part of the routines of everyday life. These routines derive ultimately from mutual reliance and trust, but then themselves reinforce social solidarity, a sense of belonging to and owing loyalty towards a European community.

Although the basic principles of mutual recognition facilitate the emergence of such transnational networks of civil society, greater support can be provided by common principles and standards that consolidate and clarify mutual expectations in transnational civil society. For example, although each country may respect and recognise the qualifications of lawyers in other countries,[30] the differences in

[30] Mutual recognition for migrating lawyers, with many reservations, is based on Dir. 77/249 on lawyers' services [1977] OJ L78/17, Dir. 98/5 on lawyers' establishment [1998] OJ L77/36 and Dir. 2005/36 on the recognition of professional qualifications [2005] OJ L255/22.

training, knowledge and competences of lawyers between Member States may well discourage the acceptance of foreign professionals in practice and prevent the formation of transnational associations and mutual dealings. Where common standards are adopted, however, even if they merely state minimum requirements for qualifications and practical experience, it is easier to overcome these reservations and concerns.

Similar arguments apply to the most basic kinds of links in transnational civil society, such as a cross-border sale of goods. Where consumers can be reasonably confident that the protections afforded by the rules of every Member State are adequate because they conform to common minimum standards, they will be more willing to take the risk of shopping abroad. Common rules can provide safety standards, a right to repair or replacement and compensation for losses and disappointment. Although consumers may still act more circumspectly when purchasing goods and services in an unfamiliar foreign context, the assurance of common standards will diminish these psychological barriers to cross-border trade.

It is probable that where urgent business needs require standardised rules regarding transnational dealings, some kind of institutional mechanism for the creation of the standards will be constructed by private actors. The history of international commerce reveals considerable ingenuity exercised by banks and merchants in constructing standardised customs and practices, such as bills of exchange, documentary credits and technical specifications for products. Although these autonomous private rule systems serve important commercial functions well, they do not contribute strongly to the building of a transnational civil society in the sense of helping to forge a common post-national identity. In their creation, these transnational trade rules and institutions lack the transparency and legitimacy conferred by a democratic legislative process.[31] As a consequence, they remain weak instruments for building a popular sense of shared identity across borders. Indeed, many of these international trade institutions may be regarded with suspicion as devices for facilitating global markets that

[31] These challenges of global governance have, of course, been explored in an extensive literature, of which examples from a legal and private law perspective are: G. Teubner (ed.), *Global Law Without a State* (Aldershot: Dartmouth Gower, 1997); O. Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Oxford: Hart Publishing, 2004); Joerges, Sand and Teubner, *Transnational Governance and Constitutionalism* above n. 29.

function outside the controls of nation states. In which case, such institutions may provoke a fruitless backlash against transnational civil society – the 'anti-globalisation' movements – and a reversion to calls for an unrealistic and impractical national autonomy. What is required instead are methods for ensuring that transnational private organisations which can impose effective normative systems comply with procedural and substantive standards such as those contained in the Nice Charter, which have been endorsed by representative political institutions. This argument suggests that transnational political institutions such as the European Union need both to assist and to regulate international commercial institutions in order to ensure the transparency and legitimacy of their operations. In particular, transnational political institutions must have the space and opportunity to ensure that the standards developed by private commercial organisations conform to the basic principles of social justice in a market economy that have been described here as an Economic Constitution.

6 Towards a European Civil Code

The case for enlarging the scope of common principles of private law, leading eventually to a European Civil Code, depends ultimately on the contribution of such rules to the construction of transnational civil society. My argument has been that without assistance and shaping by transnational political institutions, such as the European Union, the commercial arrangements, customs and rules constructed by private organisations will not establish the necessary sense of post-national identity. The *lex mercatoria*, as these international commercial standards and practices are often labelled, may have the practical effectiveness of law, but it lacks the legitimacy and transparency in its processes of creation, which are necessary for laws to provide the basis for a political identity. A combination of pluralism in the development of standards for a transnational civil society, thereby taking advantage of business and technical expertise, with a requirement for endorsement by political authorities and conformity to substantive standards such as social and economic rights, seems the most likely formula to achieve a properly functioning and accepted transnational civil society.

In Europe, in order to facilitate a transnational civil society that can form the basis for a post-national political identity, it is probably not essential to devise a comprehensive civil code that provides common rules for every kind of social and economic association or transaction.

The common rules could focus, at least initially, on supporting what are perceived to be the key building blocks that will sustain and promote networks and associations in transnational civil society. Some of these elementary building blocks are likely to be discovered in the laws governing contracts, compensation for damage and injury, protection of property rights (especially intangible proprietary interests such as copyright and financial instruments) and business associations. These ingredients may represent the priorities in a programme for building transnational social solidarity, but in principle there should be no restriction on the scope for agreeing common rules for any kinds of transactions and arrangements in civil society.

If Europe is to progress further in its aims of securing peace and prosperity for its citizens, for the time being it should concentrate not on building controversial supranational sovereign institutions, but rather on helping to support and sustain transnational networks of civil society. In the original legal framework for the European Economic Community, it was assumed that integration of communities would be achieved through a combination of the dismantling of regulatory barriers and of the application of mutual recognition principles between broadly similar systems of private law.[32] The principle of mutual recognition is often inadequate for this purpose, because it fails to ensure minimum standards of social protection and provide a reliable basis for mutual trust and confidence. Common rules and principles of private law will provide a superior basis for constructing a transnational civil society. In nation states those common rules have been provided by civil codes that provide support for the basic institutions and arrangements of civil society, such as the enforcement of contracts, compensation for damage and the structure of business associations. Similarly, the European Union needs to develop equivalent rules and institutional arrangements. In short, Europe needs to work towards a Civil Code.

This argument for a project for a European Civil Code is not closely connected to a policy of promoting the smooth functioning of the internal market throughout Europe. Uniform laws may reduce certain obstacles to trade presented by diversity in national contract laws. Yet that market integration rationale does not describe the principal reasons given here for Europe's need for common rules and principles of

[32] P.-C. Müller-Graff, 'Common Private Law in the European Community', in B. de Witte and C. Firder (eds.), *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer, 1992) 239.

private law. Instead, the project for working towards a civil code provides an opportunity to address central political needs in Europe. First, it offers the possibility of giving substance to an Economic Constitution, of providing some detail for a European Social Model that can be promoted as an ideal of justice to which we all aspire. Second, the acceptance of common rules and principles through social practice will provide substance to and support for a conception of a transnational civil society, which in turn can provide the foundation for a post-national identity, a European polity, for which supranational institutions of governance are required. In combination, these two strands will contribute to restoring confidence and respect on the part of its citizens to the European supranational political structure. Matching the origins in European integration in market building rather than political constitution building, the development of a Civil Code, perhaps commencing with contract law or merely consumer contracts, would serve as the next institutional step in creating a system of governance that reinforces the complex aims enshrined in the treaties of both ever-closer unity while respecting the sovereignty of nation states.

7 Objections, refutations and qualifications

Yet that ambitious agenda for a European Civil Code omits consideration of the many complexities, difficulties and subtleties of the proposals outlined here. The remaining chapters address many of the problems that will inevitably arise and the controversies that will ensue in pursuing the project for a European Civil Code. The nature of some of the fundamental problems, and how they will be addressed, will be briefly indicated here.

Many of the problems examined in subsequent chapters arise from the simple point that Europe has a long history and that inevitably we have to proceed from where we are now rather than from a blank sheet. One crucial constraint, examined in chapter II, concerns the evolution of the institutions and competences of the European Union so far. Having commenced its life as an international organisation with limited functional competences, its technocratic agenda has severely limited its initiatives and appreciation of the issues raised by the project for building a transnational civil society. In particular, the legislation of the European Union in civil matters is deeply unsatisfactory in numerous respects, as well as being ill equipped to perform its designated functions. It provides a poor starting-point for trying to build

institutions and networks of a transnational civil society. Even so, this existing body of laws, including the judicial interpretations of the legislation and treaties, probably cannot easily be dismantled or replaced.

In the light of the limited powers conferred by the European treaties, chapter III observes how the institutions of the European Union have approached the question of the need for a European Civil Code through a distorted and unsatisfactory perspective. This chapter argues that although recent proposals of the Commission may be going in broadly the right direction, these initiatives are motivated, at least ostensibly, by the wrong reasons. The Commission promotes projects leading towards a Civil Code as part of its internal market agenda. As a paradoxical consequence of its limited competence, however, the Commission promotes this work while denying that a Civil Code is its objective. A better justification for these projects, it is argued here, lies in the quest for an Economic Constitution and a post-national identity. As a consequence of this misconception regarding the aim of progressing towards uniform private law, the current plans and political process in Europe are deeply flawed, and the likely outcome of the technocratic deliberations is unlikely to prove fit for any significant and worthwhile purpose.

Developing that argument in chapter IV, we explore what is meant here by an Economic Constitution and consider further the contribution that a Civil Code might make to the development of a European Social Model. We examine how far the European Union has already progressed in establishing the foundations for a Civil Code that expresses a social model through its existing legislation.

Nation states have a longer history than the European Union. They possess sophisticated systems of private law already, and in many cases have done so for several centuries. Although there are family resemblances between national private law systems, with some being close relatives, the diversity of the systems represents a major problem for the construction of a European Civil Code. As well as diversity arising from the legal rules being expressed in different languages and concepts, there are major differences in form and substance. Whereas most European states have a codified system of law, judge-made common law persists in the United Kingdom, Eire and other smaller Member States. Differences in substance prove harder to detect, because the private law rules of every country endorse a version of a market economy that respects private property and freedom of contract. Yet detailed

comparative law studies constantly reveal divergences in values expressed by national laws, such as how much protection to afford a weaker party to a contract and how best to provide that protection. These legal rules have co-evolved with the social practices and conventions of their local communities and reflect those differences: by convention a consumer has the right to taste a melon in Spain before purchase, but in France and England a consumer must take the risk that the melon will not be ripe or sweet. European countries lack identical private law rules and this national diversity represents an important tradition that needs to be accommodated by supranational governance arrangements. Without powerful incentives, the English will not relinquish the common law, nor the French the Code Napoléon, nor the Germans the BGB, etc.

Chapter V addresses the challenge presented by the need to respect cultural diversity to any project for harmonising laws. The central question is how private law can be used to build solidarity between the peoples of Europe while respecting and embracing the value of cultural diversity. The principal answer to this dilemma, it is argued, lies in the construction of a code of principles rather than detailed rules. Chapter VI addresses in particular the challenges presented to a project for a European Civil Code by the existing marked diversity in the private law systems of the different Member States. Given significant disparities in the values and techniques of national private law systems, is the aspiration towards harmonisation either practicable or desirable in view of the possible disintegrative effects on national laws?

As well as confronting these problems arising from the historical legacy, any project for a European Civil Code needs to recognise that the governance arrangements in the European Union will inevitably diverge from the institutional structures established in national legal systems. It should be assumed, for instance, that it will be impracticable as well as probably undesirable to restructure civil courts into a European federal system with a transnational hierarchy of appeal courts. Civil justice must therefore comprise multi-level arrangements in which national courts will handle the bulk of the disputes arising in civil society, though with occasional guidance on difficult questions of interpretation from the European Court of Justice. As a consequence of this multi-level system of adjudication, even with a European Civil Code, the considerable autonomy of national courts will preclude the emergence of uniform private law throughout Europe. National courts will interpret the common rules and principles in divergent ways,

according to their traditions of legal reasoning, and address issues through different legal processes. Chapter VII examines the ramifications of conceiving of a multi-level private law system in Europe.

The problem then to be addressed in chapter VIII is how to cope with continuing diversity of private law in this multi-level system of governance. Elimination or suppression of diversity, it will be argued, is, in principle, undesirable. On the contrary, we need to find the virtue in the divergence of national laws of the opportunity for mutual learning and discovery. At the same time, however, it is possible to create institutions that will encourage and facilitate convergence between national private law systems. It is in this context of promoting convergence that proposals are advanced both for a European Private Law Institute and for autonomous agreements that fix the terms of transactions for the promotion of cross-border trade.

As well as providing this opportunity for mutual learning and discovery, more fundamentally a European Civil Code provides the opportunity to reconsider and enact a new statement of the fundamental principles governing civil society – the core of the Economic Constitution. Much of the private law extant in Europe was originally devised more than a century ago, at a time when political ideologies tended to prize highly values such as the sanctity of private property and contracts. The national civil codes expressed the ground rules for a liberal society, rules which unleashed the forces of a free market economy. In the twentieth century, these laws were much revised to reflect modern values, such as the protection of weaker parties to contracts including consumers and workers, or the use of insurance and tort law to redistribute the costs of accidents that cause personal injury. Instead of talking about *caveat emptor* (let the buyer beware) as in the past, today we speak of ensuring that consumers receive good-quality goods that meet their expectations in return for a fair competitive price. As a result of a succession of legislative and judicial amendments, together with doctrinal evolution, civil codes in Europe today try to endorse a more complex set of values than their liberal predecessors. The law seeks to balance personal freedom or autonomy against values such as fairness and social solidarity. Courts think today about issues in private law in ways that require them to address complex policy questions through techniques such as economic analysis and reflections on the material scope of social and political rights. In making these adjustments to modern values, private law has lost some of its coherence and integrity in all national legal systems.

Chapter IX concludes by observing that the development of a European Civil Code provides an opportunity for a more systematic approach towards the construction of private law rules that would address the new complex values that are engaged in adjudication of disputes in civil society. The patches of European private law so far enacted have compelled each national legal system to question its own settled practices and doctrinal conceptions. But these are merely fragments of a potentially much broader programme for a reconsideration of an expression of social justice in civil society. The development of a European Civil Code would above all present the opportunity for European citizens to try to express and endorse, in the words of the Lisbon Treaty, a conception of a 'social market economy' and 'social justice and protection':

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.[33]

Such a conception of a social market economy would fulfil the promise of Europe to achieve both the material advantages of a competitive internal market and at the same time to ensure a fair and socially inclusive conception of distributive justice through the protection of social and economic rights. These rules and principles would constrain and steer the market and other dimensions of civil society for the purpose of constituting and encouraging a particular and distinctive economic and social system in Europe. Chapter IX notes that a civil code is the first, crucial step, towards a balanced and complete Economic Constitution for Europe, the beginning of the realisation of a European Social Model.

[33] Lisbon Treaty, Art. 1.3, creating a new Art. 2.3 in the Treaty on European Union, 13/12/2007, OJ C306, 17.12.2007; the notion of a social market economy is open to a wide variety of interpretations, which vary in national political discourse from rather liberal markets to those more closely regulated for welfare purposes: A. Somma, 'Exporting Economic Democracy – Social Justice and Private Law from the Point of View of Non-European Countries', in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 201, 204.